

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN THE MATTER OF:	:	
MELVIN C. GELSINGER, et al.,	:	99-CV-3264
Debtor/Appellee	:	
	:	Bankruptcy No. 98-25561

POWL'S FEED SERVICE, INC.	:
Appellant	:
	:

MEMORANDUM AND ORDER

YOHN, J. February , 2000

On November 12, 1998, Melvin C. Gelsinger (the "debtor") filed a Chapter 11 bankruptcy petition. His wife, Gail Gelsinger, did not file bankruptcy. The appellant in this action, Powl's Feed Service, Inc. ("creditor" or "Powl's Feed"), is a creditor of the bankrupt's estate.

On November 11, 1996, approximately two years before declaring bankruptcy, Melvin Gelsinger was severely injured while operating a combine harvesting machine manufactured by Agco Corporation. On April 21, 1998, Melvin and Gail Gelsinger filed a complaint against Agco Corporation. The complaint asserts a product liability claim on behalf of Melvin Gelsinger. The complaint also alleges a claim for loss of consortium on behalf of Gail Gelsinger. The complaint was filed by Larry Cohan, Esquire, of Anapol, Schwartz, Weiss & Cohan. Cohan has been working toward preparing this case for trial ever since filing the complaint.

On February 10, 1999, Gelsinger filed an Application to Employ Special Counsel in which he asked that the bankruptcy court approve the retention of Cohan as special counsel for

the purpose of litigating the product liability claim against Agco. Cohan is also representing Gail Gelsinger in her related, but technically separate, claim for loss of consortium against Agco. Powl's Feed filed objections to Gelsinger's application for special counsel. On April 20, 1999, the bankruptcy court held a hearing to address the special counsel issue.

On May 26, 1999, the bankruptcy court issued its order expressly authorizing the debtor to employ Anapol, Schwartz, Weiss & Cohan, P.C. to represent the debtor as special counsel with respect to the personal injury litigation. The bankruptcy court further ordered that compensation for services provided by Anapol, Schwartz, Weiss & Cohan, P.C. would be fixed by the court. The bankruptcy court then addressed the objections filed by Powl's Feed to the appointment of special counsel. The court overruled the objections by Powl's Feed and stated that: "Any settlement, or verdict, in the underlying cause of action may be structured to quantify the consortium claim." Presently pending before this court is the appeal of Powl's Feed to the bankruptcy court's order of May 26, 1999, appointing special counsel.

STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. See In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994). A bankruptcy court's decision whether or not to remove counsel due to a conflict of interest is reviewed for abuse of discretion. See In re BH & P Inc., 949 F.2d 1300, 1316 (3d Cir. 1991); see also Locks v. United States Trustee, 157 B.R. 89, 92 (W.D. Pa. 1993) (holding that the bankruptcy court's decision not to appoint a futures representative should be reviewed under an abuse of discretion standard).

DISCUSSION

Presently pending before the court is the challenge of Powl's Feed to the May 26, 1999, order of the bankruptcy court. Specifically, Powl's Feed appeals that order because it contends that the bankruptcy court erred in appointing Cohan as special counsel pursuant to section 327(e) of Title 11 of the United States Code.

Section 327(e) of Title 11 of the United States Code provides that:

The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). This statutory section, therefore, authorizes the court to appoint special counsel to represent the trustee as long as the appointed attorney does not represent or hold any interest adverse to the debtor or to the estate. See id.

The issue here is whether Cohan represents or holds any interest that is adverse to the estate. The bankruptcy code does not expressly define the term "interest adverse to the estate." See In re Star Broadcasting, Inc., 81 B.R. 835, 838 (D.N.J. 1988). Some courts have explained that "to hold an interest adverse to the estate" means:

- (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or
- (2) to possess a predisposition under circumstances that render such a bias against the estate.

See id. (quoting In re Roberts, 46 B.R. 815, 826-27 (Bankr. D. Utah 1987), aff'd in part, rev'd and remanded in part on other grounds, 75 B.R. 402 (D. Utah 1987)); see also In re Crivello, 134 F.3d 831, 835 (7th Cir. 1998) (quoting test for adverse interest from In re Roberts). Similarly, to

“‘represent an adverse interest’ means to serve as an agent or attorney for any individual or entity holding such an adverse interest.” In re Brennan, 187 B.R. 135, 148 (D.N.J. 1995) (citations omitted), rev’d on other grounds, In re First Jersey Securities, Inc., 180 F.3d 504, 509 (3d Cir. 1999).

Powl’s Feed argues that Cohan’s representation of Gail Gelsinger in the pursuit of her consortium claim against Agco is an interest that is adverse to the interest of the estate. According to Powl’s Feed, Cohan, who represents both Gail and Melvin Gelsinger, will attempt to maximize the recovery (or the allocation of settlement dollars) for the consortium claim while minimizing the recovery (or the allocation of settlement dollars) for the product liability claim. This would ensure that Gail Gelsinger receives personally as much of the recovery as possible while minimizing the amount recovered by the debtor, and thereby, the estate. Thus, Powl’s Feed argues that Cohan has an interest that conflicts with the interest of the estate.

On April 20, 1999, in a hearing before the bankruptcy court, Powl’s Feed presented its arguments concerning Cohan’s alleged conflict of interest. The bankruptcy court rejected the arguments of Powl’s Feed in its order of May 26, 1999. The court dismissed the idea that Cohan had a conflict of interest, stating that: “Any settlement, or verdict, in the underlying cause of action may be structured to quantify the consortium claim.” I interpret the language in the bankruptcy court’s order to mandate that the bankruptcy court must approve any settlement of the action by the bankrupt’s estate and the counsel fees allocated to Cohan, and it will therefore simultaneously determine the allocation of dollars from any potential settlement¹ to the

¹As Powl’s Feed itself acknowledged in its brief, the problem of allocation will not be an issue if the product liability/consortium case is tried before a jury. See Appellant’s Brief at p. 11 n.8. If the case goes before a jury, the jury will allocate the amount of damages to the consortium

consortium claim and to the product liability claim. This allocation by the court will eliminate any possibility that Cohan as special counsel will be representing an interest that conflicts with the interest of the estate. If that interpretation is not the interpretation of any of the parties, they may seek clarification from the bankruptcy court.

Thus, I conclude that the bankruptcy court order eliminates any possibility that Cohan has an impermissible conflict with the interest of the estate. Accordingly, I will affirm the order of the bankruptcy court of May 26, 1999, appointing Cohan as special counsel for the purpose of representing Melvin Gelsinger in his product liability claim against Agco.

CONCLUSION

Having considered the arguments made by the appellant, the appellee, and having independently reviewed the record before the bankruptcy court, I conclude that the bankruptcy court was correct in determining that Cohan has no actual conflict of interest with regard to his representation of both Gail and Melvin Gelsinger in their suit against Agco. I will therefore affirm the bankruptcy court's order of May 26, 1999.

An appropriate order follows.

claim and to the product liability claim through the use of jury interrogatories. Thus, the focus of the concern of Powl's Feed is the proper allocation of funds in the event of a settlement.

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POWL'S FEED SERVICE, INC.	:
Appellant	:
	:

ORDER

AND NOW, this _____ day of February, 2000, after consideration of the Appellant's brief, and the Appellee's brief in opposition, IT IS HEREBY ORDERED that the bankruptcy court's decision of May 26, 1999, appointing Anapol, Schwartz, Weiss & Cohan, P.C. as special counsel to represent the debtor in his product liability claim against Agco Corporation is AFFIRMED in accordance with this court's interpretation of that order.

William H. Yohn, Jr., J.